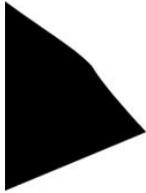


**SUBMISSION ON THE DRAFT POLICY POSITION  
ON THE CONSERVATION AND SUSTAINABLE USE  
OF ELEPHANT, LION, LEOPARD AND RHINOCEROS**



**28 JULY 2021**

*Submitted by:*





## **ORGANISATIONAL BACKGROUND**

Animal Law Reform South Africa (“ALRSA”) is a non-profit organization working to connect issues relating to the law, animal well-being and social justice in South Africa. Our mission is to work towards a society that adequately protects the rights of both human and non-human animals. We conduct our work through three key mechanisms: Legislative and Policy Reform; Litigation and Legal Services; and Education and Research.

### **Endorsements of submissions made by other parties**

Please note that ALRSA expressly endorses the submissions on this Draft Policy Position made by:

- The Wildlife Animal Protection Forum South Africa (WAPFSA)
- The EMS Foundation and Wild Law Institute
- The Pro-Elephant Network (PREN)

### **Disclaimers**

We are grateful for the opportunity to comment on this critical Draft Policy Position which stands to influence animal welfare, conservation models, and wildlife in South Africa going forward. ALRSA has, however, noted material process-related concerns (including the inadequacy of the 30-day time period for comments in light of the state of lockdown and recent events in South Africa) which have impacted on the ability to meaningfully engage with the Draft Policy Position. We recorded some of these concerns in a letter to the Director-General requesting an extension of the deadline for submissions on the Draft Policy Position dated 13 July 2021, and we have expanded on these concerns in Annexure B to these submissions. The process-related concerns that we raise in no way detract from our endorsement of the key positive elements of the Draft Policy Position that we highlight in our submission below; however, we do submit that they should be addressed before the Policy Position is finalised.

In light of these factors, please note that these comments are non-exhaustive and any omission to specifically address any aspect of the Draft Policy Position should not be deemed to constitute our acceptance of or agreement with the aspect in question. We further reserve the right to supplement these submissions.



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## EXECUTIVE SUMMARY

### *Overall perspective*

1. The Draft Policy Position on the Conservation and Ecologically Sustainable Use of Elephant, Lion, Leopard and Rhinoceros (“Draft Policy Position”) will shape South Africa’s approach to conservation and wildlife going forward. We commend the Minister and the Department of Forestry, Fisheries and Environment (“DFFE” or “the Department”) for taking the momentous step of producing this critical document. At a time when the world is witnessing the impacts of climate change in real time while in the throes of an ongoing pandemic, the extent of the importance of protecting our biodiversity and wildlife has come into sharp focus. This is a critical time for the future of ensuring environmental and ecological sustainability in South Africa.
2. In setting out the foundations of a new approach to conservation in South Africa, it is essential that the Draft Policy Position is grounded in an integrative approach<sup>1</sup> to Section 24 of the Constitution. As it stands, Draft Policy Position includes several exemplary features that are reflective of the integrative approach and that have the potential to mark a meaningful shift away from past irresponsible, unethical and unsustainable wildlife practices. At the same time, however, some features contradict the progressive foundation of the document and others may serve to limit its transformative potential.
3. Among other features set out below, we strongly support the Department for recognising that animal well-being and welfare are essential factors to take into account when examining whether a practice amounts to “sustainable use” and for its objective to immediately shut down the captive lion industry. However, the Department’s continued promotion of the trophy hunting industry is unconstitutional and goes against the very definition of sustainable use put forward in the Draft Policy Position. The nature of trophy hunting is contrary the very essence of an integrative approach to Section 24 of the Constitution, which necessarily recognises the intrinsic values of animals as individuals and the interrelationship between conservation and animal welfare. We consider this inherent contradiction to a be material issue in the Draft Policy Position.

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<sup>1</sup> The term “integrative approach” in relation to Section 24 was put forward by Professor David Bilchitz. See: D Bilchitz, ‘Exploring the Relationship Between the Environmental Right in the South African Constitution and the Protection of Animals’ Interests’ (2017) South African Law Journal 134 740-777. The Constitutional Court embraced the integrative approach in *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* [2016] ZACC 46 (‘2016 NSPCA case’)



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4. Below, we briefly set out what we submit to be the positive elements of the document that are aligned with an integrative approach to Section 24, followed by the elements which we consider to be problematic and contrary to the integrative approach.

*Positive elements of the Draft Policy Position in line with Section 24*

5. In brief, and subject to certain qualifications that we highlight in the body of this submission, we strongly support the following features:
- i. The express inclusion of animal well-being as elements of DFFE’s definition of “sustainable use”, and the express inclusion of “animal well-being and welfare” in its expanded definition.<sup>2</sup>
  - ii. The inclusion of holistic circumstances and conditions of an animal, including their physical, physiological and mental health and quality of life in the Draft Policy Position’s definition of wellbeing (which we propose should be collapsed into the definition of welfare as explained further in our submission).<sup>3</sup>
  - iii. The Draft Policy Position’s embracing of a One Welfare system which recognises the interconnectedness between animal welfare, human well-being and the environment (though the exact meaning of the One Welfare remains unclear).
  - iv. The Draft Policy Position’s proposed immediate halting of the captive lion industry and the breeding of lions for commercial purposes and consumptive use.
  - v. The Draft Policy Position’s recognition that many cultures in Africa have great reverence for wildlife premised on spiritual values and that certain practices which disregard the well-being and welfare of animals may show disregard for these values.
  - vi. The Draft Policy Position’s statements that South Africa will not support the trade of ivory and rhino horn at an international level.
  - vii. The Draft Policy Position’s statement that South Africa will not permit the live transport of the five species at an international level other than for the explicit purpose of rewilding.

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<sup>2</sup> Draft Policy Position at p10 and 32 respectively.

<sup>3</sup> Draft Policy Position at p13.



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- viii. The Draft Policy Position’s recognition of the importance of ensuring that conservation economic benefits do not only benefit a small (and predominantly white) minority, but that benefits should flow to local communities.
6. The Draft Policy Position also includes several features which are incongruent with the proper interpretation of section 24 of the Constitution and which we cannot support. These features include:
- i. The Draft Policy Position’s continued reference to animals as “biological resources”.
  - ii. The unwieldy nature of the Draft Policy Position’s definition of sustainable use, which may serve to limit its workability in practice. We propose the adoption of a clear, simple, and workable definition of sustainable use that conforms with the Constitutional Court’s statements and integrative interpretation of section 24 of the Constitution.
  - iii. As stated above, the recommended conservation policy intervention that South Africa position itself as hunting destination of choice. Indeed, in our view, this intervention at present runs counter to the thrust of the document as a whole.
  - iv. The Draft Policy Position’s characterization of hunting for sport as being a part of South Africa’s traditional heritage.
  - v. The Draft Policy Position’s omission to consider the welfare and wellbeing of elephants and failure to recommend a ban on the captive keeping and use of elephants for entertainment purposes including but not limited to elephant-back safaris and other interactions, and their use in circuses and in zoos.
  - vi. The Draft Policy Position’s proposed expansion of leopard hunting quotas.
  - vii. The Draft Policy Position’s failure to provide effective policy guidance towards a cohesive legislative and policy framework for conservation, biodiversity and animal welfare, and the failure to contextualise certain relevant existing and proposed legislation.



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*Recommendations*

7. While supporting the progressive and necessary elements of the Draft Policy Position, we throughout our submission highlight certain inconsistencies and nuances in the Draft Policy Position that could at best create ambiguity and at worst give rise to interpretations of the Draft Policy Position that run counter to its vision and goals. Overall, drawing on the specific recommendations made in the body of our submission, we emphasise the following broad and non-exhaustive recommendations be taken into account in the development of a final Policy Position:
  - 7.1 That the document refrains from referring to animals as “biological resources”.
  - 7.2 That the definition of sustainable use be condensed to be a simple, workable, and pithy definition that recognises animal welfare, wellbeing and sentience.
  - 7.3 That the definition of “wellbeing” and all of its progressive elements be incorporated into the term “welfare” as a single term.
  - 7.4 That an integrative approach to section 24 is explicitly recognised as an underlying thread through the submission.
  - 7.5 That the One Welfare approach be fleshed out as a term in South Africa in accordance with an integrative approach, and recognised as a guiding principle in all biodiversity, conservation, and wildlife decision-making.
  - 7.6 That trophy hunting of the five species should be banned outright, and economic stimulation efforts should be focused on sustainable ecotourism and photo tourism.
  - 7.7 That the Draft Policy Position imposes a ban on the captive keeping and use of elephants for any entertainment-based activities including but not limited to elephant-back safaris and other interactions, and their use in circuses and in zoos; and
  - 7.8 That the Draft Policy Position be amended to provide effective policy guidance towards a cohesive legislative and policy framework for conservation, biodiversity and animal welfare, and to contextualise relevant existing and proposed legislation.



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7.9 That an inclusively constituted Welfare Forum be established to provide input and guidance on all further legal, policy, and administrative steps that stem from the Draft Policy Position.



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## INTRODUCTION

8. The Draft Policy Position on the Conservation and Ecologically Sustainable Use of Elephant, Lion, Leopard and Rhinoceros (“Draft Policy Position”) will shape South Africa’s approach to conservation and wildlife going forward. We commend the Minister and the Department for taking this momentous step. As we will set out in further detail in this submission, the Draft Policy Position includes exemplary features that have the potential to mark a meaningful shift away from past irresponsible, unethical and unsustainable wildlife practices. At the same time, it includes some features which may serve to limit its transformative potential. This submission is grounded in legal principles and aims to highlight both the progressive features and the potentially problematic features of the Draft Policy Position in order to assist the Department in the process of the development of its final Policy Position and the subsequent enabling legislation and regulations.
9. This submission is structured as follows:
  - 9.1 First, we set out overarching issues pertaining to the substance of the Draft Policy Position all of which are centred around the necessity of taking a proper integrative approach to the interpretation of section 24 of the Constitution.
  - 9.2 Second, we address certain specific policy interventions and related statements set out in the Draft Policy Position.
  - 9.3 Third, we provide recommendations for continued and improved engagement with the animal protection, social justice and other relevant sectors.
  - 9.4 Finally, we conclude this submission by emphasising our broad concerns and making recommendations of key factors the Department should consider in the process of finalising this draft Policy Position and other governance documents which it will serve to inform.



## **FRAMING OF THE VISION AND GOALS OF THE DRAFT POLICY POSITION: AN INTEGRATIVE APPROACH TO SECTION 24**

10. As stated in the introduction to this submission, ALRSA strongly supports the Draft Policy Position’s recognition of the need for South Africa to make a decisive shift away from unethical, unsustainable and irresponsible wildlife practices. The Department’s commitment to this shift is evident in its call to halt the breeding of captive lions for commercial exploitation and in its direct incorporation of animal welfare and well-being into its exposition of its definition of sustainable use.
11. There are elements of the Draft Policy Position, however, which are inconsistent with the Department’s welfare centred-approach and, others that are liable to cause confusion and unintended consequences. Most critically, continuing to permit (and in fact promote) the trophy hunting of the five species runs counter to an integrative interpretation of section 24, and counter to the Department’s own definition of sustainable use. The argument against trophy hunting is not merely an “emotive” issue as it is at times characterised by those in favour of the sport, it is a constitutional one. It is essential for this and other inconsistent elements to be addressed in order to prevent them from undermining the overall progressive and applaudable goals of the Draft Policy Position. These elements are explored in further detail below.
12. A helpful starting point in examining the the Draft Policy Position is its description of its goals and vision. The Draft Policy Position lists its six key goals as follows, namely to:
  1. *Provide policy certainty and stable base for conservation, growth and development*
  2. *End irresponsible, unethical and unsustainable practices that greatly harm the reputation of SA.*
  3. *Reposition SA as a leader in conservation and promote Africa’s coherence and unity in relation to these species*
  4. *Better balance our economic, cultural, social and natural heritage needs.*
  5. *Re-imagine the role of protected areas, both state and other, in contributing to ecologically sustainable rural development in a manner never before conceived.*
  6. *Initiate transformation of the sector with real traction in nature-based access and benefit flows to marginalised communities with growth and transformation of the industry.*<sup>4</sup>

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<sup>4</sup> These goals are set out on p9 of the Draft Policy Position. Please note that all page references in this submission refer to the Government Gazette page referencing at the top right side of each page.



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13. These goals are intended to be in service of the Draft Policy Position’s vision of “*secured, restored, and rewilded national landscapes with thriving population of elephant, lion, rhino and leopard as indicators for a vibrant, responsible, inclusive, transformed, and sustainable wildlife sector*”.<sup>5</sup>
14. ALRSA supports the Department’s goals and vision as set out in the Draft Policy Document. ALRSA’s intention in highlighting both positive and negative elements of the Draft Policy Position is to support the Department in achieving its goals and vision.

**The Constitutional interpretation of Section 24 as a lens through which the goals and vision of the Draft Policy Position must be viewed**

15. Achieving the vision of the Draft Policy Position necessarily requires the document as a whole to be grounded in a legally sound interpretation of Section 24 of the Constitution. While Section 24 of the Constitution is referred to in different contexts in the Draft Policy Position, we submit that the Draft Policy Position should more strongly emphasise its embracing of an “integrative approach” to the interpretation of the right to a healthy environment. As has been emphasised in ALRSA’s various previous submissions to the High Level Panel,<sup>6</sup> the “integrative approach” entails recognising the intrinsic worth of animals as an integral part of section 24.<sup>7</sup> This approach to the interpretation of Section 24 has been endorsed by the Constitutional Court of South Africa in the 2016 *NSPCA* matter and constitutes a proper interpretation of the right to a healthy environment.<sup>8</sup> As will be set out in further detail below, certain overarching features of the Draft Policy Position and certain conservation policy intervention recommendations (positioning South Africa as a hunting destination of choice for the five iconic species, in particular) cannot be reconciled with an integrative approach to the interpretation of section 24. This is an inherent contradiction in the policy document.

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<sup>5</sup> The vision is set out on p18 of the Draft Policy Position.

<sup>6</sup> Including but not limited to: (i) the ALRSA and EMS Foundation’s submission to the HLP dated 15 June 2021, available: <https://www.animallawreform.org/wp-content/uploads/2020/07/HLP-Submission-ALRSA-EMS-Foundation-June-2020.pdf>; our Virtual Presentation to the HLP together with the EMS Foundation on 6 October 2020; and (iii) our Answers to the HLP together with the EMS Foundation dated 31 October 2020, available: [https://www.animallawreform.org/wp-content/uploads/2021/01/ALRSA-EMS-Answers-to-HLP-20-October-questions\\_Final.pdf](https://www.animallawreform.org/wp-content/uploads/2021/01/ALRSA-EMS-Answers-to-HLP-20-October-questions_Final.pdf)

<sup>7</sup> See: D Bilchitz, ‘Exploring the Relationship Between the Environmental Right in the South African Constitution and the Protection of Animals’ Interests’ (2017) South African Law Journal 134 740-777; *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* [2016] ZACC 46 (‘2016 *NSPCA* case’)

<sup>8</sup> *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* [2016] ZACC 46 (‘2016 *NSPCA* case’).



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16. The Draft Policy Position takes positive steps towards the realisation of an integrative approach to section 24 through its:

- i. commitment to embracing a “One Welfare” approach; and
- ii. expanded definition of sustainable use.

17. Below, we expand on the progressive aspects of these features and highlight specific issues that could detract from their potential positive impact and which we believe could be remedied through clarification.

### ***The One Welfare Approach***

18. As the Draft Policy Position stands, the adoption of a One Welfare approach is positioned as a freestanding conservation intervention. We submit however, that the One Welfare approach as recognition of the interconnectedness between animal welfare, human well-being and the environment should instead be expressly positioned at the outset of the Draft Policy Position as a principle framing the document as a whole. We are also of the view that the meaning of the approach must be clarified.

19. In “Table 1: Summary of Policy Objectives and expected outcomes” of Draft Policy Position, the following factors are listed in relation to the Policy Objective listed as “Adopt One Welfare Approach” under “expected outputs”:

- *Include a One Welfare approach within the Biodiversity policy for the sector.*
- *Incorporate humane and responsible standards and practices, including for animal welfare and well-being, into the ethos and regulation of wildlife management in South Africa*
- *Test all legislation and practices for alignment with a One Welfare approach, and revised [sic] legislation and practice accordingly.*
- *Develop and implement minimum norms and standards for welfare and wellbeing of wildlife defining terms such as humane, and “responsible practices and procedures”*

<sup>9</sup>Under the heading of “expected outcome” in the context of One Welfare, the following is stated:

- *Biodiversity sector complies with section 24 of the Constitution*
- *Strong global reputation for responsible and humane conservation and ecologically sustainable use of biodiversity.*

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<sup>9</sup> Draft Policy Position at p40.



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20. Based on these statements, policy objectives, expected outputs, and expected outcomes, the One Welfare approach stands to be a core over-arching approach that will influence all biodiversity, conservation and wildlife governance structures going forward. We strongly support the centrality of a welfare approach of this nature in principle; however we are concerned by the fact that, given the Department’s recognition of the extent of the importance of the One Welfare approach, only one paragraph in the Draft Policy Submission has been dedicated to the One Welfare approach and its description is ambiguous.<sup>10</sup> We suggest that the One Welfare approach should be fleshed out and clarified as to its meaning in the South African context. We also note that its meaning at the international level is still in development. One Welfare is considered to be an extension of the “One Health” paradigm<sup>11</sup> which is a framework increasingly being recognised in foreign jurisdictions, particularly in the context of preventing future pandemics, and may have the potential to become international law. In establishing our approach to One Welfare, principles of One Health should therefore be taken into account, given the strong connections between wildlife and human health that have been drawn and spotlighted in the current pandemic.<sup>12</sup>
21. Given that the stated “expected outcome” of the application of the One Welfare approach will be the compliance of the biodiversity sector with section 24 of the Constitution, a clear exposition of the approach that is centred around a proper interpretation of section 24 should be provided. It is positive that that The Draft Policy Position states that “Court judgments have linked animal welfare to the Environmental Right within the Constitution (s24), including the recognition that animals are sentient beings”; however, this statement does not capture the fact that the jurisprudence of the Constitutional Court of South Africa has embraced the position put forward by Professor David Bilchitz that a proper interpretation of section 24 requires taking an “integrative approach” to section 24 rather than an “aggregative approach” which entails that animal welfare and respect for individual animals is not merely linked to the right to a healthy environment but is in fact an integral part of the right.<sup>13</sup> While the term “One Welfare” has been used internationally and we whole-heartedly support the recognition of the “interconnectedness between animal welfare, human well-being and the environment”, the term’s exact meaning is unclear therefore it is essential that we adopt an unambiguous and uniquely South African definition of the term.

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<sup>10</sup> Draft Policy Position at p40.

<sup>11</sup> See: SAIIA, A One Health Approach to Combatting COVID-19 and Illegal Wildlife Trade in Africa, June 2021, available at: <https://www.onewelfareworld.org/about.html>.

<sup>12</sup> See: <https://saiia.org.za/research/a-one-health-approach-to-combatting-covid-19-and-illegal-wildlife-trade-in-africa/>

<sup>13</sup> *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* 2017 (4) BCLR 517 (CC); See also: *Lemthongthai v S* 2015 (1) SACR 353 (SCA).



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22. We therefore posit that the Draft Policy Position should explicitly refer to the adoption of an “integrative approach” to the right to a healthy environment in section 24 either in preference to or in expanding upon what constitutes a “One Welfare” approach. Further, the One Welfare approach should be positioned as a guiding policy principle throughout the Draft Policy Position, and not only as a free-standing conservation policy intervention in the manner that it is currently referenced in the Draft Policy Position.

### ***The definition of Sustainable Use***

23. The Draft Policy Position’s expanded definition of “sustainable use” is set out as follows on:

*“ ‘sustainable’ in relation to the use of a biological resource means the responsible use of such resources in a way, and at a rate, that:*

- a. does not contribute to the long-term decline of the resource in nature;*
- b. does not lead to the loss of biological diversity of the ecosystem of which it is a component;*
- c. does not compromise the ecological integrity or ecological resilience of the ecosystem of which it is part or in which it is used, in the long-term. [The use secures ecological sustainability through ensuring ecological resilience and maintaining the integrity of natural capital, in that the use would not jeopardise the ecological integrity of the ecosystem in which it occurs, and disturbance to the ecosystem and loss of biodiversity are avoided, or minimised and remedied]*
- d. is humane and does not compromise the well-being of any animal of a species of wild animal [The use of animals shows respect and concern for individual animals, is humane, responsible, and justifiable, and considers their welfare and well-being, and does not wantonly or unreasonably or negligently causing [sic] any unnecessary suffering to any animal]*
- e. serves in or is not detrimental to the public interest [in that the environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest]*
- f. considers the social, economic, and environmental impacts of activities collectively, including disadvantages and benefits [The economic and social systems are embedded within the relevant ecological system, and the economic, social, and environmental impacts of activities, including disadvantages and benefits, are collectively considered, assessed and evaluated, to ensure that economic and social development is reconciled with environmental protection]; and ensures continued and future benefits that are fair, equitable and meet the needs and aspirations of present and future generations of people [Takes places within an integrated governance system and legitimate regulatory framework that promotes the participation of all interested and affected parties. Negative aspects on people’s environmental rights be [sic] anticipated and prevented, or minimised and remedied, and that the rights of the previously disadvantaged are protected and enhanced forefronting dignity, equality and redress, as imperatives that need to drive transformation of the sector, such that the environment is protected for present and future generations.” [Footnotes omitted]<sup>14</sup> .*

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<sup>14</sup> Draft Policy Position at p34-35.



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24. We commend this definition’s emphasis on the “sustainable” element of “sustainable use” rather than on “use”, particularly consumptive use, which has characterised South Africa’s approach to wildlife in the past. We note, however, that the definition at present includes multiple elements and factors - in our view, these elements should be utilised to give effect to a much pithier and understandable definition that accords with the integrative approach. We propose the following:

*“sustainable use” refers to the deriving of benefits - whether economic, spiritual, aesthetic or otherwise - from any individual animal or species of animals in a manner that respects the intrinsic value of that individual or species, recognises their sentience and does not result in their long-term decline in the natural world. In determining what constitutes a sustainable use, the following factors are of relevance:...*”

25. We then propose the factors currently listed in the present definition (subject to our concerns and input below) should be referenced and expanded on. We highlight the following factors in relation to the Draft Policy Position’s existing definition set out above:

25.1 The continued reference to animals as “biological resources” and animals as “it” is contrary to the embracing of an integrative approach to Section 24 of the Constitution, and we take the view that all references to “biological resources” in the Draft Policy Position should be replaced with “animal”, “animals”, “species” or “wildlife”, as appropriate. The term “biological resource” suggests that animals are there as pure instruments for human ends, resources to be utilised, rather than individuals with lives deserving of respect in their own right. On this note, we wish to highlight inconsistencies in use of terminology. For example, there are certain portions of the submission where the term “wildlife” has replaced the term “biological resources” or “natural resources”. In particular, we noted the distinction in the wording used in the Draft Policy Position Strategic Impact diagram in Figure 1<sup>15</sup> and the Theory of Change in Figure 2.<sup>16</sup> The Strategic Impact Diagram records its impact statement as being “A prosperous and equitable society living in harmony with our *natural resources*” while the “Theory of Change” records the impact statement as being “A prosperous and equitable society living in harmony with *our wildlife*”. We endorse the choice of wording in the Theory of Change. We take the view that the Theory of Change diagram as a whole aligns more closely with an integrative approach to section 24 of the Constitution than the Strategic Impact Diagram. The Theory of Change makes no reference to hunting at all, and this construction is to be preferred given that, as we will explain further below and as emphasised

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<sup>15</sup> Draft Policy Position at p30.

<sup>16</sup> Draft Policy Position at p31.



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throughout this submission, any hunting of the five iconic species for entertainment or sport runs contrary to the recognition of their intrinsic worth and the accurate Constitutional interpretation of section 24. We accordingly posit that it is possible to effectively meet the goals of the Draft Policy Position without positioning hunting as a means of ensuring economic growth in South Africa.

25.2 We are in strong support of part (d) of the definition, particularly based on its recognition of the necessity of demonstrating respect for the well-being and welfare of individual animals and the effort of humaneness. This element of the definition aligns with an integrative approach to the interpretation of section 24 of the Constitution. The integration of the terms “welfare and well-being” in this expanded definition make the manner in which they are defined in Part 2 (Definitions) of the Draft Policy Position particularly important. We further propose that sentence be expressly incorporated into the definition of Sustainable use, and we provide further detail on both of these elements below.

*Relevant considerations with respect to the definitions of welfare and well-being*

- (i) The definition of well-being in the Draft Policy Position makes reference to the NEMLA Bill,<sup>17</sup> which was released for public comment in 2020. The last public text of the NEMLA Bill contained a different definition of well-being to the definition in the Draft Policy Position. We wish to note that it is confusing for the Draft Policy Position to reference a definition of a document which is still in the legislative development process, as no updated version of the NEMLA Bill has been released to the public to date.<sup>18</sup> However, we emphasise that the updated definition to be an extremely positive development.
- (ii) ALRSA submitted detailed comments on the NEMLA Bill and noted that the definition of well-being in the initial version of the NEMLA Bill was highly concerning.<sup>19</sup> That definition failed to recognise the intrinsic worth and sentience of wild animals and referred to only to the physical health of a “faunal biological resource”; therefore we consider it to be an essential development that the definition of well-being put forward in the Draft Policy Position refers to physical, physiological and the mental well-being of an animal as well as its holistic circumstances.

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<sup>17</sup> Draft Policy Position at p13.

<sup>18</sup> See current status of the NEMLA Bill at: <https://pmg.org.za/bill/706/> [accessed on 28 July 2021].

<sup>19</sup> See ALRSA’s comments at: <https://www.animallawreform.org/wp-content/uploads/2021/01/Submission-ALRSA-on-NEMLA.pdf>.



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- (iii) We submit that the definition of well-being should be further strengthened to include references to both the quality of life and death of an animal, and that the word “cope” in the definition should be substituted with the word “thrive” as an environment in which one can “cope” is not necessarily conducive to one’s mental health.
- (iv) We also note that the terms welfare and well-being are generally used collectively throughout the document, yet they are defined separately and the definition of welfare in the Draft Policy Position is less protective than the definition of well-being. As a result, our perspective is that separating out these two definitions could cause confusion and/or be liable to abuse by stakeholders invoking the term that is less protective of animals in certain circumstances. We therefore posit that the definitions should be combined into a single term. We think that the term “welfare” should be the umbrella term used, and that well-being should be an essential element of welfare.
- (v) Our reason for preferring the choice of the term “welfare” (while expanding the definition of welfare to encompass the elements of the definition of well-being) in this particular Draft Policy Position is that the Constitutional Court jurisprudence refers to the term “welfare” in its adoption of an integrated approach to the interpretation of Section 24 of the Constitution and that the term welfare is more widely used in a progressive and animal-protective manner internationally due to it being better understood and having various scientific and international connotations.

*Sentience*

- (i) Sentience is only referred to once in the document, under the description of One Welfare. This is an essential term to be incorporated and understood in order to give effect to an integrative interpretation of Section 24. As aforementioned, the Constitutional Court expressly referenced the acknowledgement of the sentience of animals in the *2016 NSPCA Case*. In addition, the Norms and Standards relating to the Management of Elephants also expressly acknowledges the sentience of these animals.
- (ii) Sentience refers to the fact that animals have a consciousness and thus are the subjects of positive and negative experiences - that, in turn, affects how we should treat them. Given that it is now widely scientifically accepted that certain nonhuman animals are sentient, and definitively the five subject species to which the Draft Policy Position applies, we request



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that there is an explicit recordal of animal sentience and that this forms one of the key overarching principles.

- (iii) A large number of countries around the world have explicitly, in their legislation acknowledged the sentience of nonhuman animals. At an international and regional level, this includes the European Union and the African Union. At a domestic level this includes countries such as (non-exhaustive): fellow African country Tanzania (2008); Lithuania (2012); USA: specifically the State of Oregon (2013); Malta (2014); Quebec (2015); New Zealand (2015); Colombia (2016); Brussels (2018); and the Australian Capital Territory (2019) and various others. Other jurisdictions have explicitly recorded the “non-thingness” of animals in their law including: Austria (1988); Germany (1990 / 2002); Switzerland (2003); the Netherlands (2011) and the Czech Republic (2012). Some countries have accorded the status of “living creatures or beings” or similar such as Portugal (2017); Slovakia (2018) and most recently Spain (2021). A few have accorded dignity or even some special status to animals.

25.3 With respect to parts (e), (f) and (g) of current the definition, we submit that these elements of the definition should be combined and viewed holistically. A freestanding “public interest” requirement could be liable to misinterpretation and abuse (as has been in the case when it comes to a “national interest” override in other contexts, such as the mineral resource governance context). In our view, (f) and (g) read together set out the range of elements that would need to be taken into account in assessing whether a particular activity is in the “public interest”. Taking a long-term rather than a short-term view of what approach is in the best interests of the public when considering environmental impact is particularly important.

### ***Other definitional elements***

26. The way that definitions are framed throughout this document will impact on the way that the definition of sustainable use is applied. It is therefore essential for each definition in the Draft Policy Position to be closely examined, and for omitted definitions to be included. For example, the terms “ecotourism” and “sanctuary” are used frequently throughout the policy document, however they are not defined. These words need to be clearly defined in order to prevent the possibility of abuse. We submit that clear definitions of these terms should be included in the Draft Policy Position. Submissions made on this Draft Policy Position by WAPFSA, PREN, and the EMS foundation together with the Wild Law Institute have provided extensive definitional



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guidance to the Department with regard to these and other definitions and we endorse their submissions in this regard.

***Absence of guidance for a cohesive legislative and policy framework under section 24***

27. The Draft Policy Position explicitly recognises the need for a cohesive legislative framework on wildlife, conservation, and biodiversity issues, yet it is ineffectual in providing genuine guidance for cohesion.<sup>20</sup>

28. The document expressly states in its “Strategic linkages” section that the recommendations which have informed the policy position “take cognisance of other legislation across sectors, and at National and Provincial level, with consideration of the role of municipalities, as well as international commitments and obligations”,<sup>21</sup> however it fails to provide clear list of the pieces of legislation and international commitments that were considered. The provision of a clear list in one place in the document would greatly assist the reader in engaging with the extensive patchwork of legislation that is relevant to issues of animal welfare, conservation, biodiversity and wildlife in South Africa.

29. The Draft Policy Position further states that:

*“This Policy Position aims to provide clarity of direction, signaling a clear policy intent to all stakeholders. This Policy Position will provide the basis for review of legislation relating to biodiversity and protected areas, and regulations promulgated thereto, as well as providing a framework for Provinces to undertake review and possible amendment of their relevant legislation. The Policy Position will inter alia provide a basis for the development of applicable Norms and Standards, to inform evidence based implementation. In addition, this Policy Position will require the various issuing authorities and management authorities to revise their policies and procedures to align with this Policy Position. Finally, the Policy Position will provide a basis for engagement by the Department across affected sectors, to promote effective inter-governmental co-operative governance.”<sup>22</sup>*

30. The document fails to adequately reference both existing legal and policy instruments, as well as those which are currently in development in the public domain. It is accordingly unclear to what

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<sup>20</sup> Draft Policy Position at p9.

<sup>21</sup> Draft Policy Position at p29.

<sup>22</sup> Draft Policy Position at p17.



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extent the Draft Policy Position will interact with these instruments, and how it will be a catalyst for reform at a national and provincial level.

31. On biodiversity governance, the Draft Policy Position states that overarching policy guidance for biodiversity conservation is provided by multi-lateral environmental agreements, “biodiversity legislation has evolved in the absence of national biodiversity policy which is legally permissible, but not ideal”<sup>23</sup>. While this is true, the Draft Policy Position fails to acknowledge National Biodiversity Framework, a draft of which was most recently revised and released for public input in March 2021,<sup>24</sup> and on which we provided detailed comments. We propose that a Framework be developed similar to the recently released draft NBF in relation to wildlife across levels and sectors in order to have a clear understanding of such documentation and how it operates in order of preference and hierarchically. In addition, which government departments and other stakeholders have responsibility for such.
32. Given the document’s welcome emphasis on animal welfare and wellbeing, it is also surprising that the Draft Policy Position has omitted to reference the Animals Protection Act<sup>25</sup> (APA) outside of two footnotes in the expanded definition of sustainable use. While the APA is largely focused on domestic animals, the Act itself and specifically the anti-cruelty provisions in section 2(1) of the APA are applicable to wild animals in captivity. It is also relevant, but not acknowledged in the Draft Policy Position, that a new Animal Welfare Bill is currently in development in parliament, although a date has not yet been set for the publication of the Draft Bill.<sup>26</sup> Another relevant piece of legislation not referenced in the Draft Policy Position, particularly in the context of animals utilised in entertainment, is the Performing Animals Protection Act.<sup>27</sup>
33. The document acknowledges the challenge of the absence of legislation dealing specifically with animal welfare, and the challenge of a lack of clarity when it comes to the mandates of different government departments with respect to wildlife management. It also speaks to the uncertainty created by the fact that wildlife issues fall under the concurrent jurisdiction of national and provincial legislative authorities. It is laudable that these challenges are clearly set out. However,

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<sup>23</sup> Draft Policy Position, at p15-16.

<sup>24</sup> ALRSA, together with the EMS Foundation, made extensive comments on the revised National Biodiversity Framework in May 2021. See: <https://www.animallawreform.org/wp-content/uploads/2021/05/EMS-ALRSA-Biodiversity-Framework-Submission-Final.pdf>.

<sup>25</sup> Animal Protection Act 17 of 1962.

<sup>26</sup> <https://pmg.org.za/committee-question/15814/>

<sup>27</sup> Performing Animals Protection Act 24 of 1935.



the Policy Document does not provide meaningful guidance as to how these challenges may be addressed.

## COMMENTARY ON SPECIFIC POLICY INTERVENTIONS AND RELATED STATEMENTS

34. Below, we make certain submissions in relation to specific policy interventions in the Draft Policy Position. In this regard, we wish to explicitly incorporate our Submission to the HLP dated June 2020,<sup>28</sup> which contains further detailed proposals and information relevant to the Draft Policy Position.

### (1) Species management policy interventions

#### *Lion*

35. ALRSA unreservedly applauds the Draft Policy Position’s policy objective of the immediate halting of the domestication and exploitation of lions and the closure of captive lion industry.<sup>29</sup> ALRSA supports the Draft Policy Position’s acknowledgments that “the commercial lion business involving intensive and selective breeding, handling, canned hunting, and bone and other derivative trade presents a threat to South Africa’s reputation with associated political and economic risks” and that “the captive lion industry does not represent ecologically sustainable use, providing very little economic activity or jobs, while benefiting a few”, and that “many cultures in South Africa identify and are spiritually aligned with lions and the captive breeding of lions is culturally dispossessing of this value to communities”.<sup>30</sup>

36. ALRSA’s supports the Draft Policy Position’s expected outcomes in relation to lion policy interventions set out in Table 1, namely the closure of the captive lion industry, the increase and expansion of extensive wildlife systems with free-roaming lions, enhanced survival and conservation of wild lions; and an enhanced global reputation and stimulated eco-tourism industry.<sup>31</sup>

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<sup>28</sup> ALRSA and EMS Foundation Submission to the High-Level Panel, June 2020, available at: [https://emsfoundation.org.za/wp-content/uploads/FINAL-SUBMISSION-TO-HLP-EMS-ALRSA\\_15062020-2.pdf](https://emsfoundation.org.za/wp-content/uploads/FINAL-SUBMISSION-TO-HLP-EMS-ALRSA_15062020-2.pdf).

<sup>29</sup> Draft Policy Position, p34. Table 1.

<sup>30</sup> Draft Policy Position, p21.

<sup>31</sup> Draft Policy Position, p34. Table 1.



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37. ALRSA submits that it is constitutionally imperative that the welfare and wellbeing of lions currently in captive lion facilities be protected as far as possible in the course of the closure of the captive lion industry. The body of the Draft Policy Position does not deal with this issue.

38. It is only briefly referenced in *Table 1: Policy Objectives and Expected Outcomes*, which states as follow under “Expected Output”:

*“Process developed and implemented for an immediate end to the breeding of captive lions, through a sterilisation process.*

*Process developed and implemented for euthanasia of the captive lion population, including consideration of other exit strategy options”*

39. ALRSA submits that further guidance should be provided to ensure that the welfare and wellbeing of lions currently in captive facilities is respected by the owners of these facilities when the ban comes into effect and these lions are no longer “financially viable”.

40. In this regard, we make the following non-exhaustive recommendations:<sup>32</sup>

- a) A moratorium on breeding and killing any lions (outside of a carefully considered and externally monitored humane process) should be introduced with immediate effect.
- b) Similarly, a moratorium on the stockpiling and trading in lions as well as their bones or body parts should be introduced with immediate effect.
- c) Provision must be made for the welfare and well-being of lions currently in captive facilities to be respected and protected. Abuse of these animals would constitute a criminal offence in under section 2(1) of Animal Protection Act.
- d) No further permits should be issued for any activities in relation to captive lions, and current permits should be revoked to the extent that this is legally allowable and justifiable in terms of relevant legislation.
- e) Legal infrastructure for intervention should be put into place for the implementation and enforcement of proposed ban. These interventions would need to provide for a transition phase and include dedicated resources for enforcement.

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<sup>32</sup> A number of these recommendations were presented by Professor David Bilchitz on behalf of ALRSA, SAIFAC and WAPFSA during the Minister’s consultation with welfare groups and NGOs on 17 June 2021. We further endorse recommendations made by Born Free and Blood Lions in respect of protecting the wellbeing of the lions in captive facilities during the closure process.



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- f) A rapid approach task team made up of animal protection and welfare members and specialists, wildlife vets, and DFFE should conduct an audit and welfare assessment of the lions in existing facilities.
  - g) Workers in these industries must be considered, and alternative opportunities provided for them.
41. With respect to alternative exit strategy options, ALRSA also recommends the global fund between NGOs and the government that could also be created to develop genuine sanctuaries to enable as many lions as possible to live out their lives in an environment conducive to their welfare and flourishing.
42. ALRSA further recommends that the policies relating to the captive breeding and exploitation of lions be extended to other big cats, both indigenous and non-indigenous so that breeders cannot disregard the welfare and well-being of other big cat species such as cheetahs, leopards, ligers and tigers.<sup>33</sup>

### ***Rhinoceros***

43. ALRSA supports the policy objective to reverse the domestication and intensification of rhinos<sup>34</sup> and the position that it is “desirable to move intensively managed rhinos out of captive breeding situations and into accepted wild management and back into wild managed or wild conditions as soon as practically possible”.<sup>35</sup> ALRSA further supports the position that trade in captive rhino horn should not be permitted - either internationally or within the country's borders. In our view, such trade, apart from being inconsistent with respect for such animals, will increase demand for their horns and thus imperil the species.<sup>36</sup>

### ***Leopard***

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<sup>33</sup> See: EMS Foundation and Ban Animal Trading, Breaking Point: Uncovering South Africa’s Shameful Wildlife Trade with China, available at: [https://emsfoundation.org.za/wp-content/uploads/BreakingPoint\\_FINAL\\_15052020\\_web.pdf](https://emsfoundation.org.za/wp-content/uploads/BreakingPoint_FINAL_15052020_web.pdf) which reports on high numbers of exotic big cat breeders in South Africa.

<sup>34</sup> Draft Policy Position, at p36.

<sup>35</sup> Draft Policy Position, at p22.

<sup>36</sup> See ALRSA and EMS June 2020 submission to the HLP at p121-128, available at: [https://emsfoundation.org.za/wp-content/uploads/FINAL-SUBMISSION-TO-HLP-EMS-ALRSA\\_15062020-2.pdf](https://emsfoundation.org.za/wp-content/uploads/FINAL-SUBMISSION-TO-HLP-EMS-ALRSA_15062020-2.pdf).



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44. ALRSA supports the policy objective that conservation of leopard should be improved, but strongly opposes the suggestion that Norms and Standards be developed to enhance and broaden the hunting of leopard. As expressed in the Draft Position Policy, leopards are a critical ecological component to ecosystems. ALRSA maintains and reiterates that no hunting of the five species should be permitted whatsoever. Specifically for leopards, it is extremely difficult to get accurate statistical information about their numbers and the precautionary principle therefore should be applied.<sup>37</sup>
45. Where there are incidents of livestock being killed by leopard, non-lethal methods must be mandated for human-wildlife conflict in these instances and compensation should be provided to farmers in these instances to disincentivise the killing of leopards through means that ultimately have inhumane impacts that lead to great suffering on the part of the animal.

### ***Elephant***

46. ALRSA submits that the failure of the Draft Policy Position to address the circumstances of captive elephants constitutes a material omission in the document. While the exploitation of captive elephants is less widespread than that of captive lions, elephant use and exploitation is still occurring in South Africa. ALRSA proposes that there should be an outright ban on the keeping and exploitation of captive elephants for profit from activities including but not limited to walking with elephants and elephant back riding, and their use as entertainment in facilities such as circuses and zoos.
47. In this regard, we note that The Pro Elephant Network (PREN) has made extensive submissions in relation to elephants on the Draft Policy Position, endorsed by ALRSA. We also refer to the extensive submissions on elephants made in ALRSA's June 2020 HLP submission.<sup>38</sup>

### **(2) Trade policy interventions**

48. ALRSA supports the policy objectives that no ivory trade or rhino horn trade should be permitted under current conditions, and takes the position that trade of ivory and rhino horn should be banned in South Africa outright. With respect to stockpiles, ALRSA supports the position that a coherent plan should be effected for the management and disposal of ivory and horn stockpiles,

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<sup>37</sup> NEMA at Section 2(4)(a)(vii).

<sup>38</sup> See ALRSA and EMS HLP Submission at p106-120, available at [https://emsfoundation.org.za/wp-content/uploads/FINAL-SUBMISSION-TO-HLP-EMS-ALRSA\\_15062020-2.pdf](https://emsfoundation.org.za/wp-content/uploads/FINAL-SUBMISSION-TO-HLP-EMS-ALRSA_15062020-2.pdf) .



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and endorses the consideration of the option of marketing stockpiles of ivory and horn to international donors and philanthropists for appropriate disposal in South Africa.<sup>39</sup>

49. ALRSA strongly supports the proposed ban on live trade of the five species and the prevention of the transfer of wild animals into captivity in other countries. ALRSA supports the proposition that the only circumstances under which live transport of wild animals outside of South Africa may be permissible is for the purposes of reintroduction into the wild in range states.<sup>40</sup>

### **(3) Conservation policy interventions**

#### ***An Issue of critical concern: Trophy Hunting Inconsistent with Sustainable Use***

50. ALRSA strongly and vehemently opposes the policy objective that South Africa be “repositioned as a destination of choice” for “legal, humane, regulated and responsible hunting of the 5 iconic species”.<sup>41</sup> This position is not an emotive one but one that is grounded in law. ALRSA submits that permitting the hunting of the five species threatens to undermine all of the progressive and constitutionally sound elements of the report and that:

- (a) The hunting of the lion, leopard, rhino and elephant cannot be squared with an integrative interpretation of section 24 of the Constitution;
- (b) Hunting, particularly trophy hunting, is contrary to the definition of sustainable use posited in the Draft Policy Position itself as it can in no way be practiced in a manner that respects an animals’ welfare and well-being as defined and contemplated in this document. It constitutes purely consumptive use and does not respect the intrinsic value of individual animals, nor recognise their sentience;
- (c) The Draft Policy Position itself expressly acknowledges that trophy hunting is under increasing international scrutiny.<sup>42</sup> The United Kingdom government, for example, is currently debating a bill which would ban the import of animal “trophies” from hunting into the UK.<sup>43</sup> There are growing anti-trophy hunting movements in many states that currently import animal

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<sup>39</sup> Draft Position Policy Page 39.

<sup>40</sup> Draft Position Policy Page 39.

<sup>41</sup> Draft Policy Position at p24.

<sup>42</sup> Draft Policy Position at p27.

<sup>43</sup> UK Parliament media: <https://committees.parliament.uk/committee/52/environment-food-and-rural-affairs-committee/news/156269/trophy-hunting-and-elephant-rides-will-proposed-new-laws-be-effective-in-tackling-cruelty-to-animals-overseas/>.



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“trophies” from African countries. Lion trophy import has been banned in France since 2015,<sup>44</sup> and trophy imports of over 200 species were banned in the Netherlands in 2016, including trophies of lion, rhino and elephants.<sup>45</sup> This means that, beyond the central legal issue that trophy hunting is not in line with a constitutional interpretation of section 24, it stands to cease to be financially viable given the direction that the world is moving in.

- (d) In line with the point above, continuing to permit, and promote trophy hunting in South Africa for the next ten years may cause material harm to South Africa’s conservation reputation, and even negatively impact on ecotourism as visitors may not wish to visit wildlife areas when aware that the animals that they are viewing may be shot. This defeats one of the document’s key goals of enhancing South Africa’s conservation reputation internationally.
- (e) The Draft Policy Position acknowledges that photo-tourism contributes significantly to South Africa’s GDP and that it is the most effective mechanism to create broad employment in scenic areas. The HLP Report noted the incompatibility of photo-tourism and trophy hunting at several points,<sup>46</sup> yet this is not acknowledged in the Draft Policy Position. The continuation and expansion of trophy hunting will have dire impacts on the photo-tourism industry in South Africa.
- (f) Further, the claim that hunting for sport or for fun is “part of the South African heritage and culture” is fundamentally untrue and deeply problematic. Trophy hunting, which is in essence hunting for sport or “for fun” has colonial roots in Africa, not African cultural roots.<sup>47</sup> This sentiment is also inconsistent with other sections of the Draft Policy Position which refer to promoting traditional knowledge and traditional appreciation of wildlife.
- (g) In the context of the captive lion industry, the Draft Policy Position expressly acknowledges that many cultures in South Africa are spiritually aligned with lions and that captive breeding is culturally dispossessing. It is unclear how this statement would not be equally applicable to trophy hunting.

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<sup>44</sup> See: <https://www.theguardian.com/environment/2015/nov/19/france-bans-imports-of-lion-hunt-trophies> .

<sup>45</sup> See: <https://www.government.nl/latest/news/2016/05/02/additional-hunting-trophies-added-to-the-import-prohibition-list>.

<sup>46</sup> See, for example: HLP report at p149 (“*Where hunting and photographic tourism are income streams on the same property, it presents challenges*”); p157 (*There is some concern over the effect of hunting elephants on photo-tourism in adjacent properties (e.g. Selier et al. 2016).*); and p285.

<sup>47</sup> See for example: Mucho Mkono, *Neo-colonialism and greed: Africans’ views on trophy hunting in social media*, available at: <https://www.tandfonline.com/doi/full/10.1080/09669582.2019.1604719>



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(h) There has been insufficient attention paid to research on the psychological impact of trophy hunting on surviving family members of animals that are killed. Witnessing family members' being killed may cause so-called "destructive behaviour" in animals due to post-traumatic stress disorder.<sup>48</sup> This, is in addition to the numerous harmful impacts on biodiversity, the ecosystem and genetic considerations, which we have highlighted in our previous submissions, for example that:

*"[H]unting is a "consumptive use" practice that has significant environmental impacts and interferes with many ecosystem processes. It influences genetic diversity and composition of species, population size, density, distribution, structure, dynamics, behaviour and the condition of habitats. It also exerts negative impacts on other animal species, plants and ecosystems. Genetic studies of wild populations in which trophy hunting takes place have shown that body weight and horn size have declined significantly."*<sup>49</sup>

51. ALRSA considers the promotion of hunting in South Africa as a purported means to boost economic gain from wildlife in South Africa to be a fundamental and material inconsistency in the Draft Policy Position that will serve to undermine the vision and goals of the document itself. ALRSA proposes that trophy hunting of the five species should be banned outright, and economic stimulation efforts should be focused on sustainable ecotourism and photo tourism.

### *Remaining four conservation intervention areas*

52. While reiterating our opposition to trophy hunting, ALRSA broadly supports the remaining four conservation policy interventions put forward in the Draft Policy Position, namely: the need for an overarching national policy on biodiversity and sustainable use to guide a coherent approach by different provinces and conservation agencies; the enhancement of conservation through wildness, naturalness and wellbeing; the adoption of the One Welfare approach (explored in detail above); and the reconceptualisation of protected areas to expand areas under protection, improve the governance and management of protected areas and prioritising the broadening of eco-tourism access to provide benefits to local communities.

53. With respect to the reconceptualisation of protected areas, it is essential for there to be regulations in place for wildlife entailing that any activities negatively affecting their welfare and well-being of

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<sup>48</sup> See: <https://africanelephantjournal.com/zimbabwe-natural-resource-group-blasts-govt-over-merciless-elephant-trophy-hunts/>

<sup>49</sup> See ALRSA and EMS HLP Submission at p84, available at [https://emsfoundation.org.za/wp-content/uploads/FINAL-SUBMISSION-TO-HLP-EMS-ALRSA\\_15062020-2.pdf](https://emsfoundation.org.za/wp-content/uploads/FINAL-SUBMISSION-TO-HLP-EMS-ALRSA_15062020-2.pdf)



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animals is outright prohibited. This will also assist with the goal of “rewilding” that it is consistently referred to in the policy. South Africa must make solid commitments to this in order to achieve the goals of the Draft Policy Position.

#### **(4) Conservation Transformation interventions**

54. ALRSA recognises and supports the pressing and ongoing need for transformation in the conservation sector in South Africa. The exploitation of South Africa’s wildlife has largely benefitted a small minority of people and this break from our current and past unsustainable wildlife practices provides an opportunity to develop practices that better serve South African communities on a larger scale, while also promoting respect for the intrinsic worth of animals.
55. ALRSA agrees in principle with the notion of developing a “transformative African approach to conservation consistent with Ubuntu”; the promotion of ecotourism and transfer of its benefit flows and for the need to promote and enhance human-wildlife coexistence.<sup>50</sup> However we are concerned by the perspective put forward that a transformative African approach should entail transformation in the hunting industry as we again reiterate that trophy hunting is not part of African heritage. The continuation of trophy hunting, particularly by international tourists is simply a perpetuation of a colonial legacy, and causes a host of issues.<sup>51</sup> Hunting of the five species should be banned and transformation and benefit flows from sustainable ecotourism and phototourism should be prioritised. In addition, communities should be empowered to derive benefit from other non-harmful activities and sustainable activities through skills development and education.
56. We support the “expected output” put forward of the development and implementation of norms and standards for responsible ecotourism in wildlife areas, including for mitigating the effect of ecotourism infrastructure and human behaviour on the wellbeing of animals.<sup>52</sup>
57. We also support the development and implementation of a National Human-Wildlife Co-Existence strategy, however it is critical that the notion of a “damage-causing” animal be carefully considered and re-defined. Animals are not by nature “damage-causing” The strategy should

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<sup>50</sup> Although we have reservations with certain aspects as highlighted in this submission including but not limited to the absence of a definition of ecotourism in the Draft Policy Position and submit that ecotourism must be sustainable and must respect the welfare of individual animals.

<sup>51</sup> See ALRSA and EMS HLP Submission at p84 – 105 ,available at [https://emsfoundation.org.za/wp-content/uploads/FINAL-SUBMISSION-TO-HLP-EMS-ALRSA\\_15062020-2.pdf](https://emsfoundation.org.za/wp-content/uploads/FINAL-SUBMISSION-TO-HLP-EMS-ALRSA_15062020-2.pdf).

<sup>52</sup> Draft Policy Position at p43.



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strongly consider the ways in which human actions can have an impact on an animal that can cause the animal to exhibit behaviours considered to be “damaging” and human influence of this kind should be reduced and ways found to minimize conflict. Where conflict occurs, the least harmful means should be mandated both to protect human individuals and the animal concerned.

**(5) Conservation capacity interventions**

58. ALRSA supports the policy objective of targeted capacity development for key components in the wildlife sector, prioritising development interventions that empower traditional communities, and improving the evidence base for best practice within the wildlife sector through developing and implementing a National Research Strategy.
59. ALRSA would like to emphasise that the research strategy should be premised on an integrative approach to Section 24 of the Constitution and should include modern research on animal sentience and the psychological impact of human activity on animal welfare and wellbeing.
60. We further submit, that the National Research Strategy should encourage independent research and as a policy be cognisant with the precautionary principle as a principle of International Environmental Law. Applying this principle in practice would mean that, where there is uncertainty about the extent of harm a practice may cause to wildlife, a precautionary approach should be taken in order to avert the potential harm.

**IMPORTANCE OF STAKEHOLDER ENGAGEMENT STRUCTURES GOING FORWARD**

61. The Draft Policy Position itself emphasises the importance of stakeholder engagement, in its statement that:

*“This policy position is intended to provide a basis for meaningful consultation with stakeholders, including various government departments and entities, traditional leaders, affected rural communities, industry stakeholders, NGOs, civil society, international partners, and other interested and affected parties. This engagement will provide for meaningful participation and influence from these stakeholders in creating a stable policy environment. The department, thereby, intends to in collaboration with the industry and communities, lead a sector transformation*



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*process for the equitable benefit of all South Africans, and ensuring strong and meaningful conservation of these iconic species as part of a thriving and protected wildlife environment for current and future generations”<sup>53</sup>*

62. ALRSA endorses this statement in the Draft Policy Position which points to the need for consistent meaningful engagement on wildlife, biodiversity and conservation issues. In the consultation meeting held with the Minister, the Department and representatives of animal welfare and protection groups on 17 June 2021, numerous stakeholders emphasized the need for continuous engagement with the animal protection and social justice sector. Engagement of this nature will be essential for the meaningful implementation of the animal welfare-centred approach of the Draft Policy Position. Particularly in relation to the animal welfare, wellbeing and social justice aims of the document. The Minister stated in the meeting of 17 June 2021 that the Department intended to establish a Welfare Forum for continued consultation with the NGO and welfare sector in the legal and policy development in this area. The Draft Policy Position does not formally make provision for the development of a Welfare Forum and we submit that an inclusively constituted Welfare Forum is essential to provide input and guidance on all further legal, policy, and administrative steps that stem from the Draft Policy Position. We also request that Animal Law Reform South Africa be included in this Welfare Forum given our unique knowledge and expertise in these areas, particularly with regard to animal law.

## **CONCLUSION AND RECOMMENDATIONS**

63. As emphasised throughout this submission, we strongly commend the DFFE for taking the vital step of developing this Draft Policy Position document and for expressing the Department’s recognition of the necessity to include animal welfare and animal wellbeing as a central tenet of the section 24 right to a healthy environment in line with taking the integrative approach.

64. However, as we have highlighted, the submission contains several features, omissions and ambiguities that cannot be reconciled with an integrative approach to the right to a healthy environment. The continued promotion of the trophy hunting industry in relation to the five species and the continued reference to these species as “biological resources”, among other features, are premised on a flawed interpretation of the conservation element of the human right to a healthy environment enshrined in section 24 of the Constitution because it embraces an aggregative approach to the interpretation of “conservation” rather than the integrative approach

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<sup>53</sup> Draft Policy Position at p17.



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that has been expressly recognised by the Constitutional Court of South Africa in the 2016 *NSPCA* Case.

65. Drawing on the specific recommendations that we have set out in the body of our submission, we flag the following broad and non-exhaustive recommendations for matters to be addressed before the Draft Policy Position is solidified into a final Policy position to be in place for the next decade:

- 66.1 That the document refrains from referring to animals as “biological resources”.
- 66.2 That the definition of sustainable use be condensed to be a simple, workable, and pithy definition that recognises animal welfare, wellbeing and sentience.
- 66.3 That the definition of “wellbeing” and all of its progressive elements be incorporated into the term “welfare” as a single term.
- 66.4 That an integrative approach to section 24 is explicitly recognised as an underlying thread through the submission.
- 66.5 That the One Welfare approach be fleshed out as a term in South Africa in accordance with an integrative approach, and recognised as a guiding principle in all biodiversity, conservation, and wildlife decision-making.
- 66.6 That trophy hunting of the five species should be banned outright, and economic stimulation efforts should be focused on sustainable ecotourism and photo tourism.
- 66.7 That the Draft Policy Position imposes a ban on the captive keeping and use of elephants for any entertainment-based activities including but not limited to elephant-back safaris and other interactions, and their use in circuses and in zoos; and
- 66.8 That the Draft Policy Position be amended to provide effective policy guidance towards a cohesive legislative and policy framework for conservation, biodiversity and animal welfare, and to contextualise relevant existing and proposed legislation.
- 66.9 That an inclusively constituted Welfare Forum be established to provide input and guidance on all further legal, policy, and administrative steps that stem from the Draft Policy Position.



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67. We thank you once again for this opportunity to comment on this critical document for the future of wildlife in South Africa. We are happy to provide any further input into this as the Department may require, as well as any resources or information in support of our submission.



## **ANNEXURE A: ALRSA'S PREVIOUS ENGAGEMENTS WITH THE HLP PROCESS**

A. Joint Submission to the HLP with the EMS Foundation dated 15 June 2020 ("Submission");

<https://emsfoundation.org.za/submission-in-respect-of-deff-high-level-panel-the-ems-foundation-and-animal-law-reform-south-africa/>

B. Presentation to the HLP with the EMS Foundation on 6 October 2020 ("HLP Presentation");

C. Written answers to specific queries posed by the HLP with the EMS Foundation dated 31 October 2020 ("Written Answers")

<https://emsfoundation.org.za/submission-in-respect-of-deff-high-level-panel-the-ems-foundation-and-animal-law-reform-south-africa/>

D. Letter to the Department in respect of the Draft Policy Position dated 13 July 2021 the "ALRSA July 2021 Letter

E. The High Level Panel Report dated 15 December 2020; (the "HLP Report");

F. Letter to the Department and HLP dated 26th March 2019 with nominations to the HLP ("Nominations Letter");

G. Letter to the Department and HLP dated 7 June 2021 in respect of the HLP Workshop;

H. Other correspondence with and submissions made to representatives of the HLP and Department in relation to the above matters and related issues between 2018 – 2021; and

I. Various submissions made to the Department on issues considered by and deliberated on by the HLP (including as ALRSA individually; with the EMS Foundation; and as a member of the Wildlife Animal Protection Forum of South Africa) (collectively referred to as the "ALRSA / HLP Engagements").



## ANNEXURE B : PROCESS-RELATED ISSUES

**Disclaimer: All process-concerns listed here and remediable and are not grounds for the revoking of the Draft Policy Position as a whole. We list these process grounds to assist the Department in addressing them.**

1. We raise process-related concerns because they have a material impact on the extent to which we, other organisations, and the broader public have been able to meaningfully engage with the substance of the Draft Policy Position. This impacts on the public's constitutional rights. These process issues in no way detract from our endorsement of the key positive elements of the Draft Policy Position that we emphasise in this submission. We in fact highlight these process-related concerns to support the Department in addressing them before developing a final Policy Position.
2. The importance of this Draft Policy Position in providing a foundation for future laws governing wildlife in South Africa, and the necessity of extensive stakeholder engagement as a result, is explicitly set out in the Draft Policy Position. While the Draft Policy Position acknowledges the critical nature of this document in influencing cross-cutting legislation and the importance of meaningful consultation, we submit that a number of process-related issues in fact serve to impede meaningful consultation and public participation for individuals that stand to be affected by the Draft Policy Position. This is contrary to the reiteration by the Constitutional Court that members of the public have the fundamental constitutional right to participate meaningfully in decisions which stand to affect them. We wish to reiterate that we support the Draft Policy Position and that these issues are remediable. Key process issues that have undermined the capacity of stakeholders to meaningfully engage with the submission include but are not limited to:
  - a. There was not adequate publicity initiated by the government around the release of the Draft Policy Position. There was no formal media release on the DFFE website on 28 June 2021 regarding the publication of the Draft Policy Position, and the Department Twitter page also did not announce its release. While the Draft Policy Position was available on the Government Printing Works website on 28 June 2021, it only seemed to be available for download on the official DFFE website on 30 June 2021. The consequence of this is that many stakeholders
3. The allocated time period of 30 days for public participation in terms of the submission of written comments on the Draft Policy Position is inadequate on the following grounds:
  - a. There was not adequate publicity initiated by the government around the release of the Draft Policy Position. There was no formal media release on the DFFE website on 28 June 2021 regarding the publication of the Draft Policy Position, and the Department Twitter page also did not announce its release. While the Draft Policy Position was available on the Government Printing Works website on 28 June 2021, it only seemed to be available for download on the official DFFE website on 30 June 2021. The consequence of this is that many stakeholders



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may not have been immediately aware of the document's release and the time at which the 30-day comment period began to run.

- b. The Draft Policy Position is highly technical in nature. A thorough analysis of the policy document often requires cross-referencing the 582-page report compiled by the High-Level Advisory Committee to Review Policies, Legislation and Practices on matters related to the management, breeding, hunting, trade and handling of elephant, lion, leopard and rhinoceros (“**HLP Report**”) on which the Draft Policy Position is based. The challenge of cross-referencing such a voluminous document in order to make informed comments on this Draft Policy Position is further exacerbated by the fact that, although Draft Policy Position states repeatedly that the HLP Report should be consulted as a detailed description of the nature of many of the issues that the Draft Policy Position canvasses, the document provides no page references (or even references to specific sections or recommendations) to HLP Report whatsoever. This means that a great deal of time is needed to self-cross-reference between the documents. We submit that, for ease of analysis by the public, the Policy Position should footnote relevant pages of the HLP Report that its provisions are derived from.
- c. A further concern about the quality of the uploaded document on the DFFE website is that Figure 1 on the Strategic Impact of the Draft Policy Position on page 30 is a colour-coded image (as described in its caption) yet the version of the Draft Policy Position on the DFFE website is only available in black and white.
- d. Further, we note that page 45 of the Draft Policy Position provides the heading of “References” but fails to list any of the references relied upon. We request that the References to the document be provided for the sake of completeness and in order to allow for meaningful public participation.
- e. We note further that on page 45 of the Draft Policy Position, it also refers to an annexure entitled (“Costed Implementation Plan with responsible implementers and quality assured SEIAS reports”) which has been omitted from the document. The public is therefore being asked to comment on an incomplete document which raises procedural concerns about the extent to which stakeholder engagement with the document can be meaningful. We request that the copy of this Annexure \_\_\_\_\_ is \_\_\_\_\_ provided.
- f. The ability to connect with all relevant stakeholders to compile informed comments has been impeded by the current Adjusted Lockdown Level 4 measures in place due to the coronavirus pandemic. The lockdown came into effect on 27 June 2021, one day before the publication date



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of the Draft Policy Position. It was hoped that the lockdown would be lifted on 11 July 2021, however the Level 4 restrictions remained in place until 26 July 2021, when the country moved to Lockdown Level 3.

- g. A further fact which influenced the ability of stakeholders in South Africa both to connect and allocate time to this submission was the devastating unrest which gripped Gauteng and Kwa-Zulu Natal (and sent reverberations across the country) between 8 July 2021 and 18 July 2021, and which impacted a number of potential stakeholders across the country.

*ii. Inadequate consultation opportunities for stakeholders to influence the content of the Draft Policy Position*

4. The 582-page HLP Rreport was released to the public on 3 May 2021. While there were some opportunities for consultation with different stakeholder groups in the form of workshops and meetings with the Minister arranged by the Department, these consultations were not publicly announced and it was unclear how decisions were taken regarding exactly who to include in each stakeholder opportunity. [In this regard, we refer to our letter dated 7 June 2021 to the Department in respect of the Workshop held virtually on 4th and 5th June 2021.]
5. ALRSA and a number of other animal protection organisations participated in a meeting with Honourable Minister Creecy on Thursday, 17 June 2021. We were extremely grateful for the opportunity to engage with the Minister, however a very short notice period was provided for preparation ahead of the meeting and the absence of a clear agenda for the meeting.
6. Further, and most critically, given that the Draft Policy Position was released 11 days after this meeting and it was stated in the meeting that the Draft Policy Position would be released shortly, it appears that this consultation was not in fact used to inform the Draft Policy Position. Therefore it is not clear when and how the input from that consultation will influence departmental policy. In order to comply with constitutional principles of transparency and openness, we submit that written records of the minutes of the various consultation meetings arranged by the Department between the release of the HLP Report and the Draft Policy Position should we made publicly available, and clarity should be provided as to the context in which the Department will be drawing on those consultations in coming to decisions given that these consultations did not inform the development of the Draft Policy Position.
7. In light of these factors, we recommend (i) that the omitted References and Annexure be provided for review in the context of the Draft Policy Position and (ii) that the public be given the opportunity to further comment on the Draft Policy Position if necessary once these are provided.



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8. The importance of adequate and truly meaningful participation in the development of the Policy Position is further underscored by the fact that the Department has stated that the next review of this Policy Position will only take place in ten years' time. This is a critical time in the future of ensuring environmental and ecological sustainability for South Africa.